

Memo

To: Hon. Christopher J. Dietzen, Chair

From: Nate Reitz, Executive Director

Date: April 10, 2018

Re: Has the MSGC ever promulgated probation guidelines or related rules?

You asked me to prepare a short memo responding to the question of whether the MSGC has ever promulgated guidelines or related rules with respect to probation. This memo is in response to that question.

In short, MSGC has not promulgated such guidelines or rules. However, the subject of nonimprisonment guidelines was raised by the Legislature in 1978, 1982, and 1988, and was studied by the Commission each time.

1. In 1978, the Legislature authorized the establishment of nonimprisonment guidelines, with probation included within the permissible scope. *This is discussed in more detail in the “Statute” section on page 2, below.*
2. At the time it promulgated the Sentencing Guidelines, the Commission opted not to establish nonimprisonment Guidelines—at least for the time being. *The Guidelines language reflecting this decision, including the 1981 comment, is discussed in more detail in the “Sentencing Guidelines” section on page 2, below. The history of this decision is discussed in the “History” section on page 4, below.*
3. In 1982, in response to a House Criminal Justice Committee recommendation to develop presumptive durations of probation and establish whether incarceration in a local jail or workhouse is a proper condition of probation, the Commission again considered the development of nonimprisonment guidelines. The Commission again chose not to develop nonimprisonment guidelines at that time. *This is discussed in more detail in the “History” section on page 4, below.*
4. In 1988, the Legislature required the Commission to study and report on “whether and to what extent guidelines should be developed to govern the type and severity of nonimprisonment sanctions imposed by sentencing judges as conditions of stayed sentences.” The Commission studied the issue and again chose not to develop nonimprisonment guidelines at that time. *An excerpt of the Commission’s responsive report to the Legislature is contained in the “History” section, beginning on page 3, below.*

Statute

Minn. Stat. § 244.09, subd. 5, has contained the following paragraph, substantially unchanged, since the statute was enacted in 1978:

The Sentencing Guidelines promulgated by the [Minnesota Sentencing Guidelines C]ommission may also establish appropriate sanctions for offenders for whom imprisonment is not proper. Any guidelines promulgated by the commission establishing sanctions for offenders for whom imprisonment is not proper shall make specific reference to noninstitutional sanctions, including but not limited to the following: payment of fines, day fines, restitution, community work orders, work release programs in local facilities, community based residential and nonresidential programs, incarceration in a local correctional facility, and probation and the conditions thereof.

Regarding this paragraph, I make the following observations:

- Elsewhere within subd. 5, the Sentencing Guidelines are required (“shall”) to establish circumstances under which imprisonment is proper, and the presumptive, fixed sentence under such circumstances. The quoted paragraph, on the other hand, permits (“may”), rather than requires, the Sentencing Guidelines to establish appropriate nonimprisonment guidelines.
- If the Commission does choose to establish nonimprisonment guidelines, the quoted paragraph requires nonimprisonment guidelines to make specific reference, at a minimum, to eight specific noninstitutional sanctions: fines; day fines; restitution; community work orders; work release; community-based treatment programs; local incarceration; and “probation and the conditions thereof.”
- Reasonable Commission members may interpret this paragraph as saying, in other words: if the Commission chooses to establish nonimprisonment guidelines, the scope of such guidelines must be rather comprehensive. The Commission cannot, for example, make local-incarceration guidelines without making reference to probation and probationary conditions; nor can the Commission make probation guidelines without making reference to local incarceration.
- While the statute does not explicitly mention the duration of probation, the phrase “probation and the conditions thereof” appears to be quite broad. Reasonable Commission members may interpret probation durations as being within the permissible scope of nonimprisonment guidelines.
- Subd. 5 does not appear to sever nonimprisonment guidelines from imprisonment guidelines; instead, both comprise “the Sentencing Guidelines.” As such, a reasonable reader of subd. 5 may conclude that the mandatory nature of the Guidelines’ procedures (“the court shall follow”) would apply equally to nonimprisonment guidelines, if they existed, as they do to the imprisonment guidelines that now exist.

Sentencing Guidelines

While the Minnesota Sentencing Guidelines do not establish nonimprisonment guidelines, Minn. Sentencing Guidelines §§ 3.A. and 3.B. do address establishing and revoking stayed sentences, and § 3.C. addresses jail credit. When their discussion of the conditions of stayed sentences moves beyond a recitation of established law, these sections generally use hortatory language (e.g., “the Commission urges”), rather than the prescriptive language found in other sections of the Guidelines (e.g., “must”).

Specifically, Minn. Sentencing Guidelines § 3.A.2 states, in part, “While the Commission has chosen not to develop specific guidelines for the conditions of stayed sentences, it recognizes that there are several penal objectives to be considered in establishing conditions of stayed sentences” Similarly, Comment 3.A.202 states, in part, “While the Commission has resolved not to develop guidelines for nonimprisonment sanctions at this time, the Commission believes it is important for the sentencing courts to consider proportionality when pronouncing a period of local confinement as a condition of probation.”

Most explicitly, Comment 3.A.201 states:

3.A.201. *The court may attach any conditions to a stayed sentence that are permitted by law and that the court deems appropriate. The Guidelines neither enlarge nor restrict the conditions that courts may attach to a stayed sentence. Minn. Stat. § 244.09, subd. 5 permits, but does not require, the Commission to establish guidelines covering conditions of stayed sentences. The Commission chose not to develop guidelines during its initial guideline development effort. The Commission has provided some language in the above section of the Guidelines that provides general direction in the use of conditions of stayed sentences.*

(Emphasis added.) This comment has remained substantially unaltered since 1981.

History

In 1988, the Legislature required the Commission to study and report on, *inter alia*, “whether and to what extent guidelines should be developed to govern the type and severity of nonimprisonment sanctions imposed by sentencing judges as conditions of stayed sentences.” 1988 Minn. Laws. ch. 483. The Commission’s 1989 report on this question provides a comprehensive review of the history of nonimprisonment guidelines, and, by necessary implication, of probation guidelines. Rather than recreate this work, an excerpt of this report, entitled *Report to the Legislature on Three Special Issues*, follows, with explicit references to probation and probation durations highlighted.

Minnesota Sentencing Guidelines Commission, *Report to the Legislature on Three Special Issues*, February, 1989.

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C. Nonimprisonment Guidelines

1. Summary of previous and current Commission efforts

Minnesota has had a sentencing guidelines system in place since May 1, 1980 for the primary purpose of establishing rational and consistent sentencing standards which reduce sentencing disparity and ensure proportionality in sanctions. Under sentencing guidelines sanctions increase in direct proportion to the severity of the conviction offense and the severity of the criminal history. The legislature, in mandating the Commission to develop guidelines for prison sanctions, also authorized the Commission to develop guidelines for

nonimprisonment sanctions, which could include up to a year in a local jail, **probation**, fines, restitution, community work service, treatment programs, and various other sanctions. The Commission chose not to develop guidelines for nonimprisonment sanctions initially and on several subsequent occasions when the issue has been reconsidered.

The Commission initially chose not to develop nonimprisonment guidelines primarily because of time constraints. The time frame given to the Commission by the legislature to develop sentencing guidelines was approximately one year. The Commission viewed prison guidelines and nonimprisonment guidelines as two separate stages and developed the prison guidelines first. The Commission dedicated most of their time to developing prison guidelines and believed not enough time remained to give adequate consideration to nonimprisonment guidelines. The Commission delayed the development of nonimprisonment guidelines for a later time.

The Commission considered the development of nonimprisonment guidelines in 1981 and again in 1982. On both occasions the Commission chose not to develop nonimprisonment guidelines. The **1982** consideration was a response to a resolution passed by a **House Criminal Justice Committee** that **recommended that the Commission develop presumptive durations of probation** and establish whether incarceration in a local jail or workhouse is a proper condition of probation. The Commission formalized their response to this resolution in the 1983 Report to the Legislature:

“Unlike many other Issues, a consensus on the issue of guidelines for the use of jails and workhouses has not emerged on the Commission. However, the majority opinion of the Commission is that guidelines for the use of jails and workhouses should not be developed at this time. There are four major factors involved in a condition of jail and workhouse guidelines, two of which indicate their establishment and two of which indicate continuing with the current system. The factors that would suggest the establishment of jail guidelines are:

- the existence of substantial disparity in the use of local incarceration that guidelines could address; and
- the need to more rationally allocate scarce jail and workhouse resources by reserving incarceration for more serious offenders.

The other two major factors were deemed more compelling and indicated the inadvisability of establishing guidelines for the use of jails and workhouses, at this time. Those factors are:

- the inequality of jail and workhouse resources—both regarding quantity and quality—in various locations around the state, which render uniform guidelines unfeasible; and
- the strong opposition of the criminal justice community to guidelines for the use of jails and workhouses which creates a political climate unfavorable to successful implementation.”

The Commission, again, considered the development of nonimprisonment guidelines in 1986 for several reasons (in addition to those previously articulated regarding disparity and proportionality problems). It appeared that the legislature was interested in offenders receiving minimum amounts of local jail time for certain offenses, as indicated by recently imposed mandatory jail terms. The State Planning Agency had recommended that the Commission address the problems of the disparate and nonproportional use of jails in their report Firm Convictions. Some local facilities were reportedly experiencing overcrowding problems.

Although the Commission recognized that the first reason for not developing nonimprisonment guidelines as stated in the 1983 Report to the Legislature (see above) was no longer as relevant due to improvements in many local facilities, the Commission still believed the second stated reason was a major concern. The Commission cited two additional reasons for not developing nonimprisonment guidelines in the 1986 Report to the Legislature:

- “1. There Is no Commission consensus on what is or should be the major sentencing philosophy behind the use of jail as a condition of a stayed sentence; i.e., punishment or rehabilitation; and
2. Some Commission members do not feel it is appropriate to set a statewide policy regarding the use of jails and other local resources because it is the local communities that must bear the financial burden.”

The Legislature, in 1988, passed a bill requiring the Commission to study whether and to what extent guidelines should be developed to govern the type and severity of nonimprisonment sanctions imposed by sentencing judges as conditions of stayed sentences. The Commission was asked to submit a written report to the judiciary committees of the House of Representatives and the Senate on or before February 1, 1989. The report is to contain proposed modifications to the sentencing guidelines, the sentencing guidelines grid or Minnesota Statutes which will, in the commission’s judgment, improve the operation of the sentencing guidelines system with respect to these issues and better achieve the sentencing goals of uniformity, neutrality, and proportionality.

The Commission has concluded that no modifications to the guidelines or Minnesota Statutes will, at this time, improve the operation of the sentencing guidelines system with respect to the issue of nonimprisonment guidelines. A discussion of the Commission’s most recent efforts and consideration of this issue is presented below. First, a data summary is presented, followed by a summary of the factors that support the development of nonimprisonment guidelines; next, a summary of the Commission work and activity, including a summary of public comment; and last, an explanation of the Commission’s conclusions regarding this issue.

2. Data Summary [omitted]

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3. Factors that support the development of nonimprisonment guidelines

The review of the data above suggests that there exists wide variation in the types and amount of nonimprisonment sanctions placed on offenders, even when controlling for the conviction offense, the criminal history score of the offender, and the jurisdiction. This variation in sentencing patterns might indicate a need for nonimprisonment guidelines. Although, the Commission is not recommending the development of nonimprisonment guidelines, it is important that the legislature recognize that the Commission did consider the data that are presented above and the following factors that support the development of nonimprisonment guidelines:

- 1) Proportionality - The sentencing guidelines were designed to increase the severity of the sanction with direct proportion to the severity of the conviction offense and the severity of the criminal history, with prison considered the most harsh sanction. The lack of structure for nonimprisonment sanctions has resulted in some offenders, who have a presumptive stayed sentence under guidelines, requesting to go to prison because the prison term is viewed as less harsh than the conditions of the stayed sentence.

Conversely, in cases where the presumptive disposition under the guidelines is a prison sentence but the judge departs from the guidelines and stays the sentence, the conditions of the stay could be substantially disproportionate to the prison term.

A third proportionality problem exists among those offenders who are given presumptive stayed sentences. Many offenders who have been convicted of low severity level crimes and/or have low criminal history scores receive the same or more extensive nonimprisonment sanctions when compared with those offenders who have been convicted of more serious offenses and/or have more extensive criminal history scores.

- 2) Uniformity - The sentencing guidelines were designed to increase the level of uniformity in sentencing for persons convicted of a felony. Uniformity has increased substantially under the sentencing guidelines system with respect to prison sanctions. There appears to be little uniformity with respect to nonimprisonment sanctions such as local jail time. Whether someone receives jail time as a condition of the stayed sentence is not consistently related to where the offender falls on the grid. The amount of jail time pronounced is equally unrelated to where the offender falls on the grid. There is also an apparent lack of consistency with respect to other nonimprisonment sanctions such as fines, restitution, the length of the stay, or treatment. Even when a measure of equivalencies is established to credit and equate the various types of sanctions, there appears to be little consistency in the overall level of nonimprisonment sanctions. This lack of consistency holds true when the focus is narrowed to an individual judge or conviction offense.
- 3) Truth and Certainty - Another goal of the sentencing guidelines is to promote truth and certainty in sentencing. With a presumptive sentencing system, criminal justice professionals, offenders, victims, and the public know what the sentencing guidelines presume is appropriate for any particular case. If the presumptive sentence is pronounced and the offender is sent to prison, everyone knows how long that offender will be in prison. The public, the victim, and other interested parties are not led to believe that the sentence is more harsh than it actually is; the offender recognizes what the sentence is and cannot manipulate correctional personnel to obtain early release. However, this goal of truth and certainty in sentencing is only met with respect to the decision to imprison in a state institution and for the duration of a prison sentence.

Approximately 80% of all felons convicted in a given year will have a presumptive stayed sentence under the sentencing guidelines. This means that approximately 80% of all convicted felons are sentenced indeterminately because there are no fixed nonimprisonment sanctions. There is no certainty that what the judge pronounces will be carried out completely as the courts have the discretion to discharge before all the original pronounced conditions have been met.

- 4) Accountability - Offenders should be held accountable for the offense of conviction, judges should be accountable for their sentencing decisions, and prosecutors should be accountable for their charging and plea negotiation decisions. Sentencing guidelines promote this accountability to some degree. However, a sentencing guidelines system that only addresses the question of prison and does not address a continuum of sanctions might possibly create the impression that if prison is not recommended - nothing happens. It appears that the offender is not being held accountable for the conviction offense. Andrew von Hirsch in a recent article in The Nation, stated: "Punishment conveys our disapproval of criminal conduct, and should be graduated to reflect that conduct's degree of reprehensibility." Nonimprisonment guidelines would provide a standard upon which the question of accountability and appropriateness could be addressed. If someone did not believe the presumptive nonimprisonment sanctions were appropriate for a particular offense, the concern could be raised with the Sentencing Guidelines Commission.

Prosecutors are held accountable under sentencing guidelines in that if a charge is reduced or dropped that results in a presumptive stayed sentence rather than a presumptive executed sentence, the sentencing judge generally may not depart and sentence the offender to prison for reasons related to elements of the more serious charge. Nonimprisonment guidelines could hold the prosecutor more accountable for any reduced or dropped charge.

- 5) Resources - The legislature mandated the Commission to "take into substantial consideration current sentencing and release practices and correctional resources, including but not limited to the capacities of local and state correctional facilities." While the Commission carefully considered the impact of

sentencing guidelines on the state correctional institutions in developing the guidelines and continues to monitor the impact of sentencing practices on prison populations, the Commission is unable to consider the impact of sentencing practices on other correctional resources. Absent a sentencing policy that addresses nonimprisonment sanctions, there is no systematic method for assessing or controlling the impact of sentencing decisions on the local resources. A structured sentencing policy for nonimprisonment sanctions would allow for more rational use of all correctional resources. It would be necessary, however, to extend such guidelines to misdemeanants as well in order to fully structure the rational use of all correctional resources.

In summary, the development of nonimprisonment guidelines could enhance the original goals of the sentencing guidelines regarding uniformity, proportionality, truth and certainty, accountability, and the rational use of limited correctional resources. The current two tier system results in approximately 20% of convicted felons receiving fixed sentences and 80% of convicted felons receiving indeterminate sentences.

4. Commission activity regarding the issue of nonimprisonment guidelines

The Commission formed a subcommittee, chaired by Judge Fred Norton, to study the issue of nonimprisonment guidelines. The subcommittee met several times over the spring and through early fall to discuss the development of nonimprisonment guidelines. Their initial discussions centered around the philosophical goals of sentencing and which goal of sentencing should be pursued in guidelines for nonprison sanctions. Although there was no consensus, there was some agreement that because the prison guidelines were primarily based on retribution that any nonimprisonment guidelines the Commission developed should also have similar goals. This emphasis on just deserts would produce an overall set of guidelines with a consistent focus and proportionality could be properly addressed as well.

The subcommittee had difficulty in determining how to structure sanctions that are primarily oriented toward the goal of rehabilitation or other utilitarian goals. The subcommittee's views on the use of treatment as a condition of probation were mixed. One view held that the purpose of treatment should be to address a problem the offender may have such as alcohol or drug abuse. It would, therefore, be inappropriate to consider treatment in the same manner as jail or fines which are more clearly designed to punish. The other view recognized that the purpose of treatment should be to "treat" but that various judges may be imposing treatment for a variety of reasons, including surveillance purposes. Thus, it became a question of how to structure the use of treatment. The justification for structuring the use of treatment within a just deserts framework is based on the idea that treatment is a deprivation of freedom and can be viewed as punishment and often is viewed as punishment by the offender. Structuring nonimprisonment sanctions on the basis of just deserts does not preclude a judge from imposing treatment with the purpose of rehabilitation in mind. **There was also a similar discussion regarding purposes of probation.**

The subcommittee reviewed several different models of nonimprisonment guidelines. Generally, the models can be described as follows:

- 1) The first model addressed a single sanction, such as jail. The philosophical approach would be retribution and relatively narrow ranges of jail time would be presumed appropriate, as indicated in each cell of the grid. Only in cells where the range would begin at zero would it be optional to not pronounce any jail and still sentence within the guidelines. This model was fairly rigid and limited in that it would not allow for other sanctions to be imposed in lieu of jail. Wider ranges would allow for more flexibility but would also provide less uniform sanctions.

- 2) The second model focused on retribution but also included the possibility of pronouncing sanctions that could be considered equivalent to jail. A specific level of sanction units was set for each grid cell and each unit was then set to equal a certain value. An equivalency chart would be displayed at the bottom of the grid that would indicate the value of one sanction unit as it relates to each type of sanction. For example, one sanction unit might be equal to one day in jail and equal to 8 hours of community work service and equal to a certain amount of fine, etc. The judge could choose among the different types of sanctions to arrive at the presumptive number of sanction units. This model allowed for more flexibility than the first model because a judge could decide to pronounce a certain fine instead of jail or use part of the sanction units for jail and part of the units for community work service. This model would be more sensitive to the variation in county resources.
- 3) The third model focused on retribution but included sanctions that could be viewed as promoting utilitarian goals. Treatment and probation equivalencies were set on the same scale as other traditional just deserts sanctions. The inclusion of these utilitarian sanctions in a just deserts model was justified by the idea that these sanctions do cause “pain” to the offender through the deprivation of freedom. Probation was difficult to equate along with the other sanctions without some distortion and wide variation in the possible sentencing outcomes.
- 4) The fourth model was very similar to the third model except it separated and structured probation lengths.
- 5) The fifth model presumed separate sanction levels for two separate purposes; i.e., punishment and utilitarian goals. The model structured the same sanctions as model four but set the equivalencies on two scales. This model presumed that both sanction levels would be addressed in the sentencing. A variation of this model would be to allow a choice between the two sanction levels; i.e., the sentencing judge could either set the nonimprisonment sanctions designed for just deserts purposes only or those sanctions designed for utilitarian purposes only.

The subcommittee and the whole Commission focused primarily on the second model. Sanction levels were developed that were set at basically, one third of the presumptive prison sentence for each grid cell. For offenders who received mitigated dispositional departures, the sanction level was set at one third of the presumptive prison duration, up to a maximum of 365 units. The Commission set up equivalencies for jail, community work service, house arrest, and day fines. (The idea of a day fine is to set the fine relative to the offender’s income and wealth.)

The Commission also agreed that any nonimprisonment guidelines should be advisory to the judge. Upon departure from the guidelines, a judge would be required to provide written reasons.

Preliminary impact analysis was conducted on the model that the Commission focused on.

The assumption was made that all sanction units would be used as jail days. The analysis demonstrated that some counties would experience increases in the need for jail resources under this model while most other counties, including Hennepin and Ramsey, would experience a decrease in the need for jail resources.

5. Public hearing on nonimprisonment guidelines

The Minnesota Sentencing Guidelines Commission held a public hearing on June 21, 1988 and again on December 8, 1988 to hear testimony on the issue of nonimprisonment guidelines. The Commission was concerned with the reaction of the criminal justice system to a major change on the system such as nonimprisonment guidelines. The Commission wanted to benefit from the insights of practitioners and citizens and involve interested parties in the study of this issue. The Commission heard from all segments of the criminal justice system, including law enforcement, prosecutors, defense attorneys, trial court judges, and corrections officials.

The vast majority of those testifying among these groups, were not in favor of the concept of nonimprisonment guidelines for statewide application. Those organizations and groups not in favor of the concept of nonimprisonment guidelines included the Minnesota District Judges Association, the Minnesota County Attorneys Association, the Office of the Attorney General, the Office of the State Public Defenders, the Minnesota Police and Peace Officers Association, the Minnesota Community Corrections Association, and the Minnesota State Sheriffs Association. There was a handful of individual corrections officers, professors, and a citizens organization that favored the concept of nonimprisonment guidelines. A list of all individuals and organizations that testified or submitted written materials is included in Appendix B. Those in favor of nonimprisonment guidelines were supportive, generally, for reasons described above in section 2 and 3. The vast majority of those who testified or supplied written comment, had major concerns regarding the development of nonimprisonment guidelines. These concerns are summarized below.

- 1) Philosophy - In deciding which offenders should receive a prison sentence, a just deserts philosophy is appropriate. If a stayed sentence is presumed, the judge should have the flexibility to tailor the sentence according to the individual offender. This flexibility allows the judge to consider other utilitarian sentencing goals such as rehabilitation, public safety, and deterrence.
- 2) Variation in community resources - Each jurisdiction has different resources to draw upon for criminal sanctions. These resources are typically funded on the local level. Statewide guidelines for nonimprisonment sanctions would not allow individual jurisdictions to utilize the available resources in the manner in which the community believes is appropriate. These statewide guidelines could also lead to the overcrowding of particular resources resulting in an economic impact to the individual county.
- 3) Variation in community priorities - Judges need to have flexibility to reflect the view of what constitutes appropriate sanctions in any particular community. Views may differ from community to community because of the frequency of particular crimes, the community's view of the severity of the crimes committed, or the resources that are available within the community. Is a statewide guidelines system better than local determination of appropriate sanctions?
- 4) Further complication of an already complex system - Even though the sentencing guidelines were designed to be fairly simple to understand and apply, a fair degree of complexity has been introduced into the system. Ambiguities continue to surface that the Commission or appellate courts must address. The introduction of a complex set of nonimprisonment guidelines could result in an unmanageable and ineffective system. More time would be needed to resolve cases.
- 5) Increased appeals - The number of appeals generated from offenders who receive stayed sentences could over burden the appellate court.
- 6) Prosecutorial discretion would be enhanced - The prosecutor, through charging practices can currently influence the presumptive sentence. This influence would become even more pervasive with nonimprisonment guidelines where all charging decisions would have direct impact on the presumptive sentence to some degree. It is preferable to keep the discretion with the judge where it is more visible to the public.
- 7) Proportionality concerns with respect to misdemeanor and gross misdemeanor sentences - Without guidelines to cover sentences for misdemeanor and gross misdemeanor convictions, there is no mechanism to promote proportional sentences between those who are convicted of felonies and those convicted of lesser offenses. This could possibly result in an offender choosing to plea to a felony offense, such as felony theft, rather than a misdemeanor level offense because the presumptive sentence under guidelines might assure the offender of a less harsh sentence.

- 8) Undermine support for sentencing guidelines - Implementation of nonimprisonment guidelines could undermine what current support exists for sentencing guidelines. Many who support the current sentencing guidelines do so because flexibility in sentencing remains in the system for 80% of the felons.
- 9) Disparity does not exist - There were those who did not believe that there is a lack of consistency in nonimprisonment sanctions. They believed that the Commission data do not demonstrate that the jail sanctions are not balanced by the imposition of other types of nonimprisonment sanctions. Also, if there are inconsistencies, they are across jurisdictions and not within a single jurisdiction, and even if inconsistencies exist within a single jurisdiction, there is probably a valid reason for the differences.

6. Conclusions and Recommendations regarding nonimprisonment guidelines

The Commission has concluded that no modifications to the sentencing guidelines or Minnesota Statutes will, at this time, improve the operation of the sentencing guidelines system with respect to this issue; and, presently no legislation or guidelines should be developed to govern the type and severity of nonimprisonment sanctions imposed by sentencing judges as conditions of stayed sentences. The Commission arrived at this conclusion for the following reasons:

- 1) As evidenced by public response, there exists a widespread lack of support for nonimprisonment guidelines on a statewide basis among criminal justice professionals. This lack of support raises question as to whether successful implementation of nonimprisonment guidelines can occur at this time.
- 2) The Commission recognized that the monitoring data indicate that there are problems with inconsistency in the use of nonimprisonment sanctions. There is only limited data available, however, on the specific type and length of treatment imposed, the use of community work service, and actual jail time served. The [absence] of current, in-depth data on these types of sanctions is problematic in terms of assessing both the level of inconsistency in sentencing practices and the impact of nonimprisonment guidelines on local resources.
- 3) The Commission explored the development of nonimprisonment guidelines that were based on retribution and were consistent with the prison guidelines, along with a structure that would provide flexibility for judges to choose among a set of possible types of sanctions. However, the Commission was unable to fully develop a feasible and complete set of guidelines in the time frame presented by the legislature. Even if the Commission were to recommend the implementation of nonimprisonment guidelines, a great deal of work would need to be completed. This process was particularly difficult given the lack of consensus on the Commission regarding the merits of and the fundamental concept of nonimprisonment guidelines.
- 4) The Commission was concerned with the complexity a nonimprisonment guidelines system would introduce in the criminal justice system. While a nonimprisonment guidelines system that allows for exchanges of various types of sanctions to be made would provide more flexibility and be less of a burden on local resources, this type of system would also be more complex. The Commission was particularly concerned with this issue in light of recently adopted changes the Commission passed with respect to the weighting of criminal history score.
- 5) Any system for nonimprisonment guidelines that used “social factors” to determine the sanction would be in direct opposition to the guidelines’ principle of neutrality.

While the Commission has concluded that nonimprisonment guidelines should not be developed at this time, the Commission remains concerned about the inconsistency in nonimprisonment sanctions that is suggested by the available data and recognizes that there may be merits to structured sentencing in the area of nonimprisonment

sanctions. Therefore, there are several specific actions the Commission would like to pursue to assure continued attention is given to this issue.

- 1) There currently exists a number of local and regional corrections agencies that are working to develop guidelines or have developed guidelines for their recommendations to judges for sanctions on a case by case basis. The Department of Corrections has such a policy (pilot project) as well as the Dodge/Fillmore/Olmsted county area. The Commission will continue to consider such efforts and review their progress.
- 2) The Commission encourages individual jurisdictions to continue to develop local guidelines and to share such policy developments with the Commission. Since the date of the public hearing on this issue, the Commission is aware of a number of jurisdictions that are developing some form of nonimprisonment guidelines, including Anoka county, Ramsey county, and the Dodge/Fillmore/Olmsted county area. The Commission will assist as much as possible to provide necessary information to these jurisdictions for purposes of development, implementation, evaluation, and assessment of the resource impact of any nonimprisonment guidelines.
- 3) The Commission will study and determine what action is necessary to improve the Commission's monitoring system to include more complete information on nonimprisonment sanctions imposed by the judge and those nonimprisonment sanctions actually carried out. When possible, the Commission will take the action necessary to make such improvements.

In closing, the legislature made the decision to mandate a commission to develop and implement a prison guidelines system for the purpose of promoting more determinate, uniform, and proportional sentencing. Due to the continued concerns among criminal justice professionals regarding the need to individualize nonimprisonment sanctions and not have the judge be constrained by any guidelines, it will perhaps be necessary for the legislature to likewise mandate the development and implementation of nonimprisonment guidelines if the legislature believes that such guidelines are in the best interest of the state.